MOTION FILED

JAN 22 1996

No. 95-974

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND PROPOSED BRIEF OF THE EQUAL OPPORTUNITY FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

J. E. McNeil
*Counsel of Record for Amicus*
McNeil & Ricks, P.C.
4614 Wisconsin Ave., N.W.
Washington, D.C. 20016
(202) 686-2600

January 22, 1996

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Movant Equal Opportunity Foundation, Inc. ("EOF"), is a non-profit educational corporation, dedicated in part to fostering a pro-assimilation middle ground on the issue of immigration - rejecting the views of both nativists claiming that today's immigrants cannot assimilate and multiculturalists who argue that they should not. EOF participated in this case as an unsuccessful amicus curiae (with the Washington Legal Foundation) during the Ninth Circuit's *en banc* review. Consent to file this brief was received from three of the four counsels of record, but no response was received from counsel for respondent Arizonans Against Constitutional Tampering.

EOF's interest in this case arises from the decision below's likely effect on one of EOF's primary activities: reform of bilingual education. Although bilingual education reform issues were briefed at the Ninth Circuit level and will be affected by any decision in this case, they are not treated in depth in the Petition for Certiorari. Since the form of bilingual education is one of most common and expensive language-choice decisions faced by governments at many levels, this Court should consider the important constitutional issues raised by this case in the context of bilingual education reform.

Respectfully submitted.

J. E. McNeil
*Counsel of Record for Amicus*
McNeil & Ricks, P.C.
4614 Wisconsin Ave., N.W.
Washington, D.C. 20016
(202) 686-2600

No. 95-974

# In The
# Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
*Petitioners*

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
*Respondents*

On Petition for a Writ Of Certiorari to the
United States Court of Appeals for The Ninth Circuit

## BRIEF AMICUS CURIAE OF THE EQUAL OPPORTUNITY FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

J. E. McNeil
*Counsel of Record for Amicus*
McNeil & Ricks, P.C.
4614 Wisconsin Ave., N.W.
Washington, D.C. 20016
(202) 686-2600

January 22, 1996

## INTEREST OF AMICUS

The Equal Opportunity Foundation ("EOF") is a non-profit educational organization, founded in 1987, dedicated in part to fostering a pro-assimilation middle ground on the issue of immigration - rejecting the views of both nativists claiming that today's immigrants cannot assimilate and multiculturalists who argue that they should not. EOF's President, Linda Chavez, is a former director of the U.S. Commission on Civil Rights and has written about this case. Linda Chavez, "Multilingualism Getting Out of Hand," USA Today, Dec. 14, 1994.

EOF is concerned that the decision of the United States Court of Appeals for the Ninth Circuit in this case will have substantial effects on the ability of language minority children to learn English. EOF, which is at the forefront of the debate over methods of teaching language minority children, does not wish the First Amendment to enshrine some teaching methods which may be harmful to children.

## STATEMENT OF CONTEXT

"Bilingual education began as a good idea. Now it needs fixing." Susan Headden, "Tongue-tied in the Schools," U.S. News & World Report, September 25, 1995, 44. "[B]ilingual education has emerged as one of the dark spots on the grim tableau of American public education. . . . [T]he program was born of good intentions, but today it has mushroomed into a $10 billion-a-year bureaucracy that not only cannot promise that students will learn English but may actually do some children more harm than good." *Id.*; "New York's Bilingual 'Prison,'" The New York Times, A22, col. 1, September 21, 1995 ("Whatever the merits of bilingual education, the present approach may be harming more students than it helps.").

The New York Board of Education recently concluded that new immigrants instructed in English alone performed better than students in bilingual education programs where comparatively little English is spoken. Board of Education of the City of New York, *Educational Progress of Students in Bilingual and ESL Programs: A Longitudinal Study, 1990-1994*, October 1994, ii; American Legislative Exchange Council, "Bilingual Education in the United States, 1991-92" in *Report Card on American Education*, 1994, 3 ("there is no conclusive research that demonstrates the educational superiority of bilingual education over ESL [English as a Second Language programs].").

The harm to children, both language minority and others, is easily documented. "According to the [New York City] Board of Education study, 90 percent of the students who enter bilingual education between sixth and ninth grade fail to move on to regular classes within the required three years. Among students who enter between first and third grade, the failure rate is 75 percent." "New York's Bilingual 'Prison'", *supra*. In some children who speak only English are placed in bilingual classes because of their surnames. Headden, *supra*, at 44; Linda Chavez, Out of the Barrio, 1991, at 30. Parents' requests to have their children taught in English are disregarded. "'Why?' the teacher asked. 'Don't you feel proud to be Hispanic?'" Headden, *supra*.

This is an active political controversy, and therefore should never have been considered by the federal courts. In November, the California Board of Education adopted a new educational policy in which they abandoned California's traditional preference for bilingual education programs. CONG. REC. (daily ed.) December 5, 1995, H 13932. Congressional hearings on bilingual education are beginning. *Id.* Sen. Robert Dole has made reform of bilingual education a plank of his presidential campaign. Bob



Dole, "Ticket to the American Dream," The Washington Post, December 19, 1995, A 15, col. 1.

In Arizona, this controversy may erupt again, as a result of the Ninth Circuit's decision. The Arizona Constitition requires that "schools shall always be conducted in English". Art. XX, § 7, ARIZ. CONST. Similarly, the Arizona bilingual education statute provides that the goal of bilingual education in that State is to teach children English so they can transfer to classes taught in English. A.R.S. § 15-754. These requirements may be challenged.

## REASONS TO ISSUE THE WRIT

### I) The Ninth Circuit's Decision to Use the First Amendment to Determine Bilingual Educational Policy Conflicts With Decisions of Other Courts:

Until the decision in this case, language choices in education had been a political question. In *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923), this Court said "The power of the State to . . . make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." The decision in this case changed that understanding. The Ninth Circuit "disapproved" the decision in *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978), which said that the choice of language in schools was a political, not a constitutional, matter.

As shown above, mounting evidence demonstrates that prior bilingual teaching methods may harm some children. The decisions on how best to educate language minority children should be flexible, based on the best available information.

Now, however, under the Ninth Circuit decision in this case, the First Amendment will be the test for teaching methods. If, for example, a teacher refuses to teach chil-

dren English, the State may not discipline the teacher; after all, there is no legal difference between what Respondent Maria-Kelley Yniguez seeks to do in this case (prepare Spanish-language legal materials) and what a teacher might do (teach only in a language other than English). Just as with Yniguez, the teacher is "speaking" on behalf of the state, and would have the same rights granted to Yniguez not to be "compelled" to say something the teacher did not agree with.

Last year this Court unanimously said: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay Group of Boston*, __ U.S. __, 115 S.Ct. 2338, 2350 (1995). Yet that is what the Ninth Circuit would do in this case, solely to promote "the diverse and multicultural character of our society." 69 F.3d at 948.

Under the Ninth Circuit's analysis, what the State cannot do to others under *Hurley*, its own employees may do to it. That position conflicts with this Court's decisions.

For example, in *Minnesota State Board for Community Colleges v. Knight* ("*Minnesota*"), 465 U.S. 271, 283 (1984), this Court said: "Appellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public [or] as **government employees**". Similarly, "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to iisten or respond to individuals' communications on public issues. Indeed, in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-466 (1979), the Court rejected the suggestion. . . . Disagreement with public policy and disapproval of offi-



cials' responsiveness . . . is to be registered principally at the polls." *Id.*, 465 U.S. at 285.

In *Hurley*, this Court granted certiorari "to determine whether the requirement to admit a . . . message not of the . . . organizers' own choosing violates the First Amendment." __ U.S. at __, 115 S.Ct. at 2343. This Court should review this case as well.

## CONCLUSION

This Court should grant the Petition and issue the writ.

Respectfully submitted.

J. E. McNeil
*Counsel of Record for Amicus*
McNeil & Ricks, P.C.
4614 Wisconsin Ave., N.W.
Washington, D.C. 20016
(202) 686-2600